FULLER'S *THE MORALITY OF LAW*

Reviewed by

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THE MORALITY OF LAW. By Lon L. Fuller. New Haven, Conn.: Yale University Press, 1964. Pp. viii, 202. $5.00.

The consciences of jurisprudential thinkers, especially those who are partisans of legal positivism, have been rudely challenged by the excesses of the Hitler regime. Well known in this context is the impressive conversion of G. Radbruch, the principal representative of positivism in the Germany of the period before 1933. The problem of respect owed the juridical order presented itself in practical terms to the German judges of the postwar era. To what extent should a law or precedent which runs counter to the "sense of justice of all right-thinking men" retain its validity for the judge who follows in the wake of a corrupt legal system? A parable of the sort which Lon Fuller likes, and which he publishes as an appendix to his study (pp. 187-95) under the title "The Problem of the Grudge Informer," clearly presents the moral, juridical, and political difficulties which faced those jurists who inherited the baneful legacy of Hitler's rule. Is there an obligation to respect the law ("Law is law") even if that law is opposed to the most elementary rules of conscience? No one has ever claimed this. Even the most intransigent positivists do not hesitate to recognize, especially after the Nazi experience, that moral duty should in certain cases take precedence over the respect due to law. For a positivist, however, the law commands a *certain* respect by the very fact that it is the law — that it possesses the formal characteristics which determine a juridical order. This is the thesis defended by H. L. A. Hart in his article, "Positivism and the Separation of Law and Morals,"[1] and in his brilliant book, *The Concept of Law*.[2] It is to this affirmation that Fuller takes exception, in the article written in response to Hart's "Positivism and Fidelity to Law, A Reply to Professor Hart,"[3] and in the present volume, *The Morality of Law*.

Fuller admits that a legal order is not necessarily an order conformable to the demands of morality — in its content it may violate particular moral principles. But it cannot be characterized as a legal *order* unless it is in some way oriented toward those conditions which constitute the sine qua non of all legality. These conditions of Fuller constitute the "internal morality of law," a morality which those who collaborate in the enterprise of law must respect if the law itself is to command respect.

Fuller regards the law not as a system of internally consistent rules, but as "the enterprise of subjecting human conduct to the governance of rules." If a legal system is to be an efficacious means of ensuring the ends that the law proposes for itself, it must satisfy insofar as possible eight conditions; if it fails, it risks failure in the "legal enterprise" in one way or another. These conditions are:

1. That there be general rules formed to guide particular actions.
2. That these rules be made known to the public, or at least to all those to whom they are addressed.
3. That they not be retroactive.

[1] 71 HARVARD LAW REVIEW 593 (1958).
[2] Oxford, Clarendon Press, 1961.
[3] 71 HARVARD LAW REVIEW 630 (1958).

4. That they be adequately clear and comprehensible.
5. That they not be inconsistent with one another.
6. That they not demand the impossible.
7. That they be reasonably stable, protected from continual changes.
8. That those charged to apply the law conform to its prescriptions.

This set of conditions which Fuller views as the "procedural version of natural law" (p. 96) corresponds to what American law characterizes as "due process of law." (p. 103)

These requirements were systematically disregarded by Hitlerian law. For Fuller it could not have been otherwise because a profoundly immoral law-making power cannot, in his view, without provoking outright scandal, observe the rules of internal morality of the law. On the other hand, no legal system can perfectly fulfill these conditions; they are no more than an ideal which can never be fully attained. Since the juridical enterprise is in reality either more or less effective, the existence of a legal system is for Fuller a question of degree; it exists to a greater or lesser degree insofar as the juridical enterprise has succeeded to a greater or lesser extent. Fuller does not hesitate to relate his conception of law to the idea which Michael Polanyi developed in his work *Personal Knowledge* to characterize the scientific enterprise. (p. 120)

It follows from Fuller's conception of law that there is no necessity for a single legal system to rule over a population living in a given territory; as he sees it, it is a lesson of history that for the most part the same populations are often subjected to different legal systems with individual laws and even different tribunals. Private institutions, such as universities, are free to elaborate their own rules; and these rules cannot be assimilated to contractual dispositions except by means of fictions.

At first sight the conception presented would seem to make it difficult to distinguish between law and morality. For Fuller, however, the fact that what is involved is a deliberate undertaking makes understandable the way in which it naturally leads to the establishment of legislative and judicial powers and also to recourse to a system of sanctions in order to guarantee respect for their decisions. Such a conception of law, which sees in legal texts a means toward the realization of certain ends, leads naturally to a teleological interpretation of these texts, as opposed to an analytical interpretation, and especially one which focuses on the sense of each term of the law to get its meaning.

For Fuller, all morality may be divided into a morality of duty and a morality of aspiration — the first imposing a minimum of obligations indispensable for life in society, the second seeking to realize an ideal of the good life. Since the law has only to impose the minimum of rules necessary for the life of society, it can be linked with the morality of duty, which is made known chiefly in prohibitions easy to formulate. As only a minimum of rules can be made binding upon all, it is essential in Fuller's view that individuals be permitted to have different moralities of aspiration, different ways of realizing their ideals of life. The distinction of this type, which sets the demands of life in society against the ideal of individual liberty without thereby raising conflicts, seems somewhat optimistic

to me, insofar as it seems to exclude conflicts between the morality of aspiration and the morality of duty or law. Can we not conceive of a morality of aspiration forcing us to oppose juridical laws? We have only to think of the problem posed by the conscientious objector to see at once that the scheme given us by Fuller somewhat oversimplifies reality by doing away with the possibility of conflict between moral and legal obligations.

What we should particularly note is that Fuller's analysis fails to give any great weight either to the statist aspect of law (a concept so pronounced in the work of Kelsen, for example) or to sanction, which is often considered characteristic of the rule of law.

The rules which express the internal morality of law enable a legal order to assure "legal certainty." What best satisfies the demand for such certainty is a long-standing custom, well known and respected on all sides, in a static society, so that there is never any need to have recourse to judges to interpret it and to ensure respect for it. Legal enterprise is chiefly indispensable to a society which is evolving and so in need of the capacity to adapt to new situations by the help of legislative intervention, judicial interpretation, and the sanctions necessary to assure respect for new rules. It is because it should be capable of innovation that law can be considered as an enterprise. But if it is to guarantee respect for its rules, if they are to guide effectively the conduct of men, is the internal morality of law as envisaged by Fuller adequate? Is it enough to assure legal certainty, and is it not equally important that those whose conduct we wish to regulate should respect, spontaneously, the legal norms, either because they recognize their utility and their justice, or because they admit the competence and the authority of those who have adopted and promulgated them? If law is indeed an enterprise to be judged by its success, that success will be all the greater if obedience to its norms is owing more to persuasion than to force, if it is recognized that its rules contribute to the realization of justice and the common good, if there is respect for the legislators charged with elaborating the rules and the judges charged with applying them. Sanction, resort to force, should, in this perspective, intervene only as the *ultima ratio regum,* the last and not the first motive for justifying obedience to the law. From this point of view we can understand the anarchistic dream of an ideal society in which force is forsworn, where no one looks to the State to apply force or to a law which envisages its use. Is not, in fact, the law which we conform to voluntarily, in the absence of any organized sanction, apt to be, like international public law, for example, the one most scrupulously concerned to convince those whom it seeks to regulate of the justice of its dispositions?

The merit and novelty of Fuller's attempt lie in its bringing out of the fact that what is regarded by positivists as the specific characteristic of law — the existence, that is, of legislators, judges, and gendarmes — constitutes no more than a group of techniques created to eliminate the inflexibility of old laws, their obscurity and the contempt into which they have fallen. Actually, insofar as the juridical enterprise is successful, its rules clear and unquestioned, those to whom these rules are addressed observe them of their own accord; they are like the rules of custom which, whatever their origin and inspiration, regulate without

incident the life of primitive societies. Do not the general principles of law, which we are considered to know independently of the legislator's intervention, present the same characteristics? By dint of taking as the specific features of the law those features which distinguish a system of law from religious, moral, or customary prescriptions, we have neglected what all these have in common — the aim of regulating the behavior of men.

Although Fuller's study has not drawn *all* the consequences which seem to me to flow from his point of view, it has nevertheless the great merit of having focused attention upon certain of these consequences, those which relate to the achievement of legal certainty through what he calls the internal morality of law. With lucidity and force, in his habitual charming way, he brings us successfully further away from the trodden paths of legal positivism. Analyzing the idea of legal order he stresses his "procedural version of natural law." But respect for law demands more. We must be convinced that the laws are just and tend to the common good, or at least, we must recognize the authority and legitimacy of those who are legally qualified to decide what is just and realizes the common good.

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Translated by JEANNE RODES.